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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

BRADLEY STEVEN GUNTHER, Plaintiff and Appellant, v. SHERRY GUNTHER, Defendant and Respondent.	B203911 (Los Angeles County Super. Ct. No. LC078125)

APPEAL from an order of the Superior Court of Los Angeles County, Bert Glennon, Jr., Judge. Reversed.

Sinclitico & Burns, Dennis J. Sinclitico, Hugh R. Burns and David J. Ozeran for Plaintiff and Appellant.

Nick A. Alden for Defendant and Respondent.

SUMMARY

A wife reported an assault by her husband to the police, and the husband was charged with, tried for and ultimately acquitted of the crime of spousal battery. The husband later brought a civil action against the wife, alleging, among other things, a claim for malicious prosecution. He alleged his wife made false accusations that led to his arrest and prosecution. The wife filed a special motion to strike the complaint, which the trial court granted. (Code Civ. Proc., § 425.16.) The husband contends the motion should have been denied. We concur.

FACTUAL AND PROCEDURAL BACKGROUND

On January 17, 2006, defendant and respondent Sherry Gunther contacted the Los Angeles Sheriff's Department (LASD) to report that her then-husband, plaintiff and appellant Bradley Gunther, had assaulted her. Bradley[1] was arrested and charged with spousal battery. (Pen. Code, § 243, subd. (e)(1).) Bradley was subsequently tried by a jury and acquitted of the domestic violence charge.

Bradley filed the instant action against Sherry alleging causes of action for intentional infliction of emotional distress and abuse of process (both of which are no longer at issue),[2] and for malicious prosecution. In the malicious prosecution claim, Bradley alleged that, in the course of the parties' contentious divorce action, Sherry falsely accused him of committing acts of domestic violence against her, accusations that resulted in his wrongful arrest. He alleged Sherry did so in an effort to have him forcibly removed from the family home and to obtain an advantage in the family law proceeding

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1 We refer to the parties by their first names for the sake of clarity; no disrespect is intended.

2 The parties correctly agree with the trial court's conclusion that the claims for abuse of process and emotional distress are barred by the litigation privilege. (Civ. Code, § 47, subd. (b); *Flatley v. Mauro* (2006) 39 Cal.4th 299, 321-322; *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 361.)

on issues related to child custody and spousal support. In support of his contention, Bradley claimed two witnesses at his criminal trial testified they had spoken with Sherry before January 17, 2006, and that Sherry told them she "would give false testimony and would falsely accuse [Bradley] of committing certain criminal acts in order to improperly have [him] removed from the . . . family residence." Bradley alleged he was damaged as a result of the criminal case.

Sherry moved to strike the complaint under section 425.16 of the Code of Civil Procedure, the so-called anti-SLAPP statute.[3] She contended Bradley's complaint arose from privileged communications, made in the course of filing a police report against Bradley for domestic violence and subsequently seeking restraining orders in the family law court. In addition, with respect to the malicious prosecution claim, she argued Bradley could not demonstrate a probability he would prevail at trial, because he could not show that the District Attorney's criminal prosecution, was commenced without probable cause, or at Sherry's direction. The trial court agreed and granted the motion. Bradley appealed.

DISCUSSION

Bradley contends the trial court erred when it granted the anti-SLAPP motion because he established a prima facie case of malicious prosecution. We agree.[4]

Code of Civil Procedure section 425.16[5] sets forth the procedure for bringing a special motion to strike in lawsuits filed primarily to "chill" or punish the valid exercise

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3 SLAPP is an acronym for "strategic lawsuit against public participation."

4 The parties dispute the effect of Sherry's failure to obtain rulings on her evidentiary objections to materials Bradley submitted in support of his opposition to the anti-SLAPP motion. By failing to press for a ruling on the objections in her anti-SLAPP motion, Sherry has forfeited those objections on appeal. (*Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 713.)

5 All undesignated statutory references are to the Code of Civil Procedure.

of the constitutional rights to free speech and to petition the government to redress grievances. (§ 425.16, subd. (a); *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 197.) The statute provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 426.16, subd. (b)(1).) As is relevant to this appeal, the statute defines an "'act in furtherance of a person's right of petition or free speech'" as including "any written or oral statement made before a[n] . . . executive, or judicial proceeding, or any other official proceeding authorized by law" or "made in connection with an issue under consideration" by such body or in such proceeding. (§ 425.16, subd. (e)(1) & (2).)

The anti-SLAPP law involves a two-step process for analyzing whether a claim is subject to being stricken. First, the defendant bringing the anti-SLAPP motion must demonstrate that the acts about which the plaintiff complains were taken in furtherance of constitutional rights of petition or free speech in connection with a public issue, as defined by the statute. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733 (*Jarrow Formulas*).) If this showing is made, the movant need not separately demonstrate the statement also concerns an issue of public significance. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.)

Once the defendant satisfies the first step, the burden shifts to the plaintiff to demonstrate a reasonable probability of prevailing on the merits at trial. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute – i.e., that arises from protected speech or petitioning *and* lacks even minimal merit – is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) Our review of the trial court's ruling on an anti-SLAPP motion is de novo. (*Marlin v. Aimco Venezia, LLC* (2007) 154 Cal.App.4th 154, 158.)

1. Protected activity

Although the parties ignore it, the first issue we must decide is whether Bradley's cause of action for malicious prosecution, predicated on the claim that Sherry instigated a criminal prosecution against him, is subject to an anti-SLAPP motion. We conclude Bradley's claim of malicious prosecution is plainly one that concerns an act "in furtherance of [a] person's right of petition" under the federal and state constitutions (§ 425.16, subd. (b)(1)) that is protected under the anti-SLAPP statute. The protections of section 425.16 attach to any written or oral statement, made before or in the course of an executive, judicial or other official proceeding. (§ 425.16, subd. (e)(1).) The protections also attach to prelitigation conduct, including statements made in connection with or in preparation of litigation. (*Flatley v. Mauro*, *supra*, 39 Cal.4th 299, 322, fn. 11; *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537.)

In *Jarrow Formulas*, *supra*, 31 Cal.4th 728, the Supreme Court held that malicious prosecution claims that arise out of civil lawsuits are not exempt from anti-SLAPP motions. It reasoned: "[B]y its terms, section 425.16 potentially may apply to every malicious prosecution action, because every such action arises from an underlying lawsuit, or petition to the judicial branch. By definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit. [Citation.]" (*Id*. at pp. 734-735, fn. omitted; see also *Soukop v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.)

In *Dickens v. Provident Life and Accident Ins. Co.* (2004) 117 Cal.App.4th 705 (*Dickens*), Division Four of this District considered whether a malicious prosecution claim predicated on an underlying criminal prosecution was subject to an anti-SLAPP motion. In that case, the plaintiff-insured sued his disability insurer after he was acquitted of insurance fraud charges. (*Id*. at p. 707.) He alleged the insurer had conducted a biased investigation and submitted its results to federal prosecutors in an effort to persuade them to commence criminal proceedings against him. (*Id*. at p. 709.) The court noted the holding in *Jarrow Formulas.* And, citing its own earlier decision in

Dove Audio, Inc. v. Rosenfeld, Meyer & Susman (1996) 47 Cal.App.4th 777 in which it held that a malicious prosecution action arising out of attorneys' presuit demand letters threatening the filing of complaints with the state Attorney General was subject to the anti-SLAPP statute – the *Dickens* court held that, "[b]y a parity of reasoning, whatever contact [the insurer] had with the federal authorities was likewise within the ambit of the [anti-SLAPP] statute. It was contact with the executive branch of government and its investigators about a potential violation of law. The contact was preparatory to commencing an official proceeding authorized by law: a criminal prosecution for mail fraud. And to the extent Dickens's claim is based on testimony or evidence offered at his trial, that was clearly part of an official proceeding authorized by law." (*Dickens*, *supra*, 117 Cal.App.4th at p. 714.)

Dickens also relied on *Hagberg v. California Federal Bank*, *supra*, 32 Cal.4th 350 (*Hagberg*), which held that the litigation privilege (Civ. Code, § 47, subd. (b)) absolutely shields those who report suspected criminal activity to the authorities. (*Id*. at p. 364.) The *Dickens* court concluded, "a malicious prosecution action predicated upon a defendant's alleged participation in procuring a criminal prosecution against a plaintiff falls within the ambit of the anti-SLAPP statute. This conclusion furthers the statute's salutary purpose of acting as 'a procedural device for screening out meritless claims' which arise out of constitutionally protected conduct connected to a public issue. [Citation]." (*Dickens*, *supra*, 117 Cal.App.4th at p. 716, quoting *Jarrow Formulas*, *supra*, 31 Cal.4th at p. 737.)

Here, Sherry's complaint to the LASD about Bradley's assault was prefatory to an official police investigation. It occurred in the context of that investigation and in connection with consideration by the DA as to whether to prosecute Bradley. All of Sherry's subsequent statements to the LASD and DA, made in follow-up interviews and in preparation for Bradley's criminal trial, were similarly connected to official proceedings. Bradley's malicious prosecution claim arose directly out of these statements. Even if Sherry's allegations were false, as Bradley claims, and therefore are not protected speech, courts generally presume the validity of the claimed constitutional

right at the first step of the anti-SLAPP analysis, leaving consideration of the truth or falsity of the challenged statements for the second stage. (See *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1088-1089.) Under *Jarrow Formulas* and *Dickens*, Sherry's statements must be considered protected petitioning activity under the anti-SLAPP statute. (§ 425.16, subds. (b)(1), (e)(1).)

2. Prima facie showing of valid claim

To satisfy the second prong of the anti-SLAPP analysis, Bradley must demonstrate the complaint is both legally sufficient and supported by a prima facie showing of facts which, if credited at trial, would sustain judgment in his favor. (*Jarrow Formulas*, *supra*, 31 Cal.4th at p. 741.) The four elements of a malicious prosecution claim brought to redress a wrong resulting from a wrongful criminal prosecution require that the plaintiff demonstrate that the underlying action was: (a) brought by or at the instigation of the defendant; (b) terminated in plaintiff's favor; (c) brought without probable cause; and (d) initiated with malice. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871; *Williams v. Taylor* (1982) 129 Cal.App.3d 745, 754.) Here, only the first, third and fourth elements are at issue. There is no question that Bradley's acquittal in the criminal action constituted a favorable termination.

a. Instigation of prosecution

This element, in the context of an underlying criminal prosecution, "'consists of initiating or procuring the arrest and prosecution of another under lawful process . . . . The test is whether the defendant was actively instrumental in causing the prosecution.' [Citation.]" (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720, italics omitted.) A private citizen may be liable for malicious prosecution only if he or she "has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff committed a crime. [Citations.]" (*Ibid*; see also *Cedars-Sinai Medical Center v. Superior Court* (1988) 206 Cal.App.3d 414, 417.) On the other hand, one "who merely alerts law enforcement to a possible crime . . . is not liable [for malicious prosecution] if, law enforcement, on its own, after an independent

investigation, decides to prosecute." (*Williams v. Hartford Ins. Co.* (1983) 147 Cal.App.3d 893, 898.)

Sherry contends Bradley cannot establish this element because she had no control over the DA's decision to prosecute Bradley for spousal battery and, indeed, that action proceeded against her wishes and after she twice told the detective investigating the matter that she did not want her husband to be prosecuted.

Bradley produced sufficient evidence in opposition to Sherry's anti-SLAPP motion that, if credited at trial, would support a finding in his favor on this first element. Sherry accused Bradley of physically assaulting her, an accusation that led directly the LASD's investigation and the DA's filing of a criminal charge against Bradley. There is also evidence which, if credited at trial, would support a finding that there is at least minimal merit in Bradley's claim that Sherry knew the charge of domestic violence was false. Specifically, testimony by two witnesses at Bradley's criminal trial could support an inference Sherry fabricated the story about Bradley's physical assault because that was how she believed she could get him out of the house.[6] This is sufficient to raise an

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[6] Nancy Fischman is a social acquaintance of Sherry's with whom she walked regularly. Fischman testified she and Sherry often discussed Sherry's unhappy marriage, Sherry's desire to have Bradley leave the house, and his refusal to cooperate. Sherry never explained to Fischman that she had a plan to remove Bradley from the home. Sherry did tell Fischman she knew "no other way than to do what her father did to her mother, which was to claim that he was hurt by her . . . , and then to call the police and have her removed from the house, and that that's the only way she knew that would get him out." Sherry told Fischman she might have to resort to that. Fischman tried to convince Sherry not to carry through with that idea, but Sherry told her "she needs to do what she needs to do." Sherry claims Fischman was lying, and trying to get back at her for having stolen her boyfriend, a charge Fischman denied. Although Fischman was aware Bradley had been charged with domestic violence, she did not know he was being tried for that crime. She came to testify only after she happened to be called as a potential juror on Bradley's criminal case, and revealed that she knew Bradley and Sherry. She was released as a juror, and subsequently contacted Lisa Clinite, another friend of Sherry's. Bradley's attorney later called both Fischman and Clinite to testify.

Clinite is another woman with whom Sherry Fischman exercised regularly, and whose children attended the same school. When she testified, Clinite reiterated what Fischman said; that Sherry was very unhappy, wanted a divorce and wanted Bradley to

inference and constitutes a prima facie showing that Sherry was willing to manufacture evidence in order to achieve her goal of having her husband removed from the family residence. If credited at trial, it could sustain a favorable finding on the first element of the four-part test for a malicious prosecution claim.

b. Probable cause

"When, as here, the claim of malicious prosecution is based upon initiation of a criminal prosecution, the question of probable cause is whether it was objectively reasonable for the defendant . . . to suspect the plaintiff . . . had committed a crime. [Citations.]" (*Ecker v. Raging Waters Group, Inc.* (2001) 87 Cal.App.4th 1320, 1330.) This absence of probable cause element is satisfied if the person who was instrumental in initiating the underlying criminal action had no reasonable basis to believe that action was arguably tenable. The inquiry has both factual and legal components: the factual component involves an examination of what facts the instigating party knew or believed (either at the time the suit was initiated or that he or she subsequently discovered) to be true; the latter factor examines whether such facts gave rise to a legally tenable claim. (*Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 624; *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 497-498.) Whether probable cause existed for a criminal prosecution is a question of law. If the facts are undisputed, the question is decided by the court. If the evidence is in conflict, the jury decides the issue based on instructions as to what facts, if established, constitute probable cause. Only the question as to the existence of the facts is submitted to the jury. (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 481, pp. 706-707, and multiple cases cited thereat.)

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move out, but he refused to cooperate. Clinite testified that, once when she, Sherry and Fischman were walking, Sherry said something to the effect that she understood "now why [her] dad did that to [her] mother and got him [*sic*] out," and "the only way to get something [*sic*] out of the house was if they are abusing, otherwise I'm stuck with him." Sherry had not given any specific details, nor did she say she was actually going to do that, and Clinite did not know if Sherry had actually done what she threatened.

As with the first element of the malicious prosecution claim, Bradley produced evidence in opposition to Sherry's anti-SLAPP motion that, if credited, would support a finding in his favor on the element of lack of probable cause; i.e., that Sherry knew she had falsely charged him with criminal conduct. (Cf. *Weber v. Leuschner* (1966) 240 Cal.App.2d 829, 836 [jury could find defendant did not have probable cause to file felony charge of having issued check for nonsufficient funds when evidence showed that defendant knew payment was stopped, not for insufficient funds, but because of a dispute over the amount owed].) Specifically, the criminal charge levied against Bradley closely tracked accounts given by two independent witnesses – each of whom was a friend of Sherry's, not Bradley's – that Sherry planned to fabricate a story in which she would claim her husband committed spousal battery in order to extricate him from the family home, just as Sherry's father had done to her mother, years before. These facts are sufficient to support an inference that Sherry, whom her friends knew had become increasingly desperate to remove her husband from the house and was unable to think of any other means to accomplish that goal, was willing to manufacture evidence to support her vendetta against him. Bradley has shown a reasonable probability of establishing the third element of his malicious prosecution claim, namely, that the criminal proceeding against him was pursued without probable cause.

c. Malice

Malice, the final element of a malicious prosecution action, "relates to the subjective intent or purpose with which the defendant acted in initiating the prior action. [Citation.] The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice . . . . [Citation.] The plaintiff must plead and prove actual ill will or some improper ulterior motive. [Citation.] It may range anywhere from open hostility to indifference." (*Downey Venture v. LMI Ins. Co.*, *supra*, 66 Cal.App.4th at p. 494, italics omitted.) Although the absence of probable cause will not automatically prove malice, it is evidence that may be considered together with other circumstantial evidence from which the trier of fact may infer malice. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 218.) "'Malice,' as an element of

a malicious prosecution cause of action, 'is not limited to actual hostility or ill will toward plaintiff but exists when the proceedings are instituted primarily for an improper purpose.' [Citations.] [¶] Malice may be proved directly, or it may be inferred from the fact that the defendant lacked probable cause." (*Jacques Interiors v. Petrak* (1987) 188 Cal.App.3d 1363, 1371.)

Malice is usually proved by circumstantial evidence, e.g., acts or declarations of the defendant indicating prejudice, ill will or an attempt to gain private advantage. (See, e.g., *Burke v. Watts* (1922) 188 Cal. 118, 127 [defendant told the plaintiff he would "fix him" and told officers he would send him to the penitentiary].) Malice is a permissible inference that may, but need not, be drawn from lack of probable cause. Put differently, if the defendant lacked a substantial basis for believing in the plaintiff's guilt, but nevertheless was instrumental in instigating criminal proceedings against him, it could logically be inferred that the defendant's motives were improper. (*Ibid*; *Weber v. Leuschner*, *supra*, 240 Cal.App.2d at p. 836 [malice inferred from lack of probable cause and defendant's failure to disclose facts to his attorney or to the district attorney].)

We conclude Bradley has made a prima facie showing of facts which, if believed, would support an inference that Sherry was willing to manufacture evidence and bring criminal charges against Bradley to further her ulterior plan and motive to have him removed from the family home and to obtain an advantage over her husband with respect to child custody and spousal support issues in the family law proceeding. This is sufficient to support a finding of malice. Accordingly, we conclude the trial court erred in granting the anti-SLAPP motion.

3. Family law court's restraining order does not constitute res judicata

Sherry maintains the allegations of Bradley's complaint mirror those which were the subject of the complaints she filed with the LASD and, later, with the family law court in order to obtain restraining orders. As a result, she contends Bradley's allegations

are barred by the doctrine of res judicata in its subsidiary form of collateral estoppel.[7] We disagree.

Under the doctrine of collateral estoppel, a party who has previously litigated an issue against the same party may not relitigate that issue again, even in a new context. The five elements of collateral estoppel are well-established. "'First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.' [Citation]." (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 848; *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 530-531.)

These elements are not met here. The record contains no evidence as to the specific issues determined by the family law court in issuing the restraining orders, nor any indication that those issues were identical to issues raised in this malicious prosecution action. Collateral estoppel applies only where the issue decided in the prior action is identical to the issues presented in the present case.[8]

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[7] "Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.' [Citation.]" (*Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 896.) Res judicata precludes relitigation of a cause of action only if (1) the decision in the prior proceeding is final and on the merits; (2) the present action is on the same cause of action as the prior proceeding; and (3) the parties in the present action or parties in privity with them were parties to the prior proceeding. (*Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 974.) Res judicata bars the litigation of claims that were or could have been litigated in a prior proceeding. (*Id*. at p. 975.) Here, we are concerned only with the collateral estoppel aspect of res judicata.

[8] In the interest of public policy, Sherry invites us to create an exception to the tort of malicious prosecution in cases involving domestic violence. We decline to do so.

DISPOSITION

The judgment is reversed. Bradley is awarded his costs on appeal.

NOT TO BE PUBLISHED

WEISBERG, J.*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

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*Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.